

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

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| COMMONWEALTH EDISON COMPANY, | : | |
| | : | |
| | : | No. 02-0277 |
| Regarding a Complaint and Petition By | : | |
| Commonwealth Edison Company For An Order | : | |
| Finding PDV Midwest LLC In Violation Of The | : | |
| Prohibition On Resale Of Retail Electric Service | : | |
| Contained In the Illinois Public Utilities Act And | : | |
| Set Forth In Rider 12, Conditions Of Resale Or | : | |
| Redistribution Of Electricity By The Customer To | : | |
| Third Persons, And For Other Relief. | : | |

COMMONWEALTH EDISON COMPANY’S
REPLY TO PDV MIDWEST’S AND CITGO’S AFFIRMATIVE DEFENSES

Commonwealth Edison Company (“ComEd”), by its attorneys, and for its Reply to the Affirmative Defenses that have been raised by PDV Midwest Refining, L.L.C. (“PDV Midwest”) and CITGO Petroleum Corporation (“CITGO”) (collectively “Respondents”), states as follows:

1. ComEd is bound by the terms of the Rate CS Contract. The express terms of the Rate CS Contract entered into between ComEd and PDV Midwest on August 5, 1997, provides for ComEd’s provisioning of electric service to each and every point of service for the refinery, calciner plant and needle coking plant located at the Lemont Facility. All amounts due and owing ComEd under the Contract in exchange for its provisioning of electric service were fully and timely paid in accordance with the express terms of the Contract. No breach of contract has occurred that has caused ComEd to suffer any compensable harm or for which ComEd is entitled to any relief.

REPLY: Admitted that ComEd and PDV Midwest entered into an Electric Service Contract dated August 5, 1997 (the “Contract”) that provided for, among other things, the “supply” of electric service to the facility located at 135th Street and New Avenue in Lemont, Illinois (the “Premises”) pursuant to ComEd’s Rate CS and other applicable rates and riders as

provided for therein. In further reply, ComEd states that the Contract speaks for itself, and that any allegations in this paragraph that are inconsistent with the Contract are therefore denied.

Denied that the Contract “provides for ComEd’s provisioning of electric service to each and every point of service for the refinery, calciner plant and needle coking plant located at the Lemont Facility.” In further reply, ComEd states that the Contract provides for the “supply” of electricity at the Premises that was “required by the Customer” (i.e., PDV Midwest) for its operations. In further Reply, ComEd also states that the Contract does not provide for, and does not permit, the “supply” of electricity to PDV Midwest for re-sale to others as has been alleged in this case.

Admitted that PDV Midwest has made payments under the Contract. Denied, however, that all “amounts due and owing ComEd under the Contract in exchange for its provisioning of electric service were fully and timely paid in accordance with the express terms of the Contract.” This allegation is denied because ComEd has not received compensation for the electricity provided under the Contract that was re-sold in violation of the Contract terms.

To the extent that this paragraph alleges that “[n]o breach of contract has occurred that has caused ComEd to suffer any compensable harm or for which ComEd is entitled to any relief,” it states a legal conclusion to which no reply is required. To the extent that a reply is required, this allegation is denied for those reasons stated in ComEd’s Verified Complaint and Amended Petition filed in this matter.

2. ComEd knew of the Respondents’ and Unocal’s respective ownership interests in the refinery, the needle coking and calciner plants both during, and following the termination of, the Uno-Ven partnership. At the meeting held between representatives of ComEd and Uno-Ven on April 24, 1997, the Uno-Ven representatives provided ComEd with an accurate description of the stated ownership interests. Any belief by ComEd at the time ComEd entered into the Rate CS Contract with PDV Midwest that the refinery, calciner plant and needle coking plant had each previously

been, and/or would each subsequently remain, under the joint and common ownership of both PDV Midwest and Unocal constituted a unilateral mistake on the part of ComEd for which ComEd is not entitled to any relief. Respondents were unaware, and had no reason to be aware, of any unilateral mistake on the part of ComEd.

REPLY: Admitted that a meeting was held “between representatives of ComEd and Uno-Ven on April 24, 1997.” Denied that as a result of this meeting, “ComEd knew of the Respondents’ and Unocal’s respective ownership interests in the refinery, the needle coking and calciner plants both during, and following the termination of, the Uno-Ven partnership.” Also denied that at the meeting, “Uno-Ven representatives provided ComEd with an accurate description of the stated ownership interests” in the Premises.

To the extent that this paragraph alleges that “[a]ny belief by ComEd at the time ComEd entered into the [Contract] that the refinery, calciner plant and needle coking plant had each previously been, and/or would each subsequently remain, under the joint and common ownership of both PDV Midwest and Unocal constituted a unilateral mistake on the part of ComEd for which ComEd is not entitled to any relief,” it consists of a legal conclusion to which no reply is required. To the extent that a reply is required, this allegation is denied.

Similarly, to the extent that this paragraph alleges PDV Midwest and CITGO were “unaware, and had no reason to be aware, of any unilateral mistake on the part of ComEd,” it is also based on a legal conclusion to which no reply is required. To the extent that a reply is required, ComEd states that it does not presently have information that is sufficient to permit it to admit or deny the allegation that PDV Midwest and CITGO were “unaware, and had no reason to be aware, of any unilateral mistake on the part of ComEd.” This allegation is therefore also denied for this additional reason.

3. Any alleged misrepresentation by Respondents concerning the ownership structure of the refinery, calciner plant and needle coking plants following the termination of the Uno-Ven partnership was innocently made, and ComEd received full and timely payment for all electricity provisioned under the Rate CS Contract.

REPLY: Admitted that ComEd has received payments under the Contract. Denied, however, that ComEd has received “full and timely payment for all electricity provisioned under the Contract,” because, as stated above, ComEd has not received compensation for the electricity provided under the Contract that was re-sold in violation of the Contract terms.

To the extent that this paragraph alleges that “[a]ny alleged misrepresentation by Respondents concerning the ownership structure of the refinery, calciner plant and needle coking plants following the termination of the Uno-Ven partnership was innocently made,” it states a legal conclusion to which no reply is required. To the extent that a reply is required, this allegation is denied.

4. ComEd lacks standing to pursue its request for back-payments. ComEd received full and timely payment for all electricity provisioned to the refinery, needle coker and calciner plants pursuant to the terms of the Rate CS Contract. Any claim that the costs of electricity under the Rate CS Contract were inappropriately allocated between PDV Midwest, Needle Coker and Chicago Carbon is a claim arising on behalf of Needle Coker and Chicago Carbon, and properly before the Circuit Court of Cook County.

REPLY: Admitted that ComEd has received payments under the Contract. Denied, however, that ComEd has received “full and timely payment for all electricity provisioned under the Contract,” because, as stated above, ComEd has not received compensation for the electricity provided under the Contract that was re-sold in violation of the Contract terms.

The remaining allegations of this paragraph consist entirely of legal conclusions to which no reply is required. To the extent that a reply is required, these allegations are denied.

Specifically, and in further reply, the allegation in this paragraph that the “costs of electricity under the [Contract] were inappropriately allocated between PDV Midwest, Needle Coker and Chicago Carbon” is denied because Needle Coker and Chicago Carbon were not parties to the Contract and because the Contract provided only for the “supply” of electricity to PDV Midwest. Needle Coker and Chicago Carbon therefore were not subject to the Contract, and the costs thereof could not be “allocated” to them. Rather, electricity provided under the Contract was re-sold to Needle Coker and Chicago Carbon as is alleged in the Verified Complaint and Amended Petition filed in this matter.

5. ComEd has failed to allege facts supporting a cognizable claim for any violation of the Illinois Public Utilities Act. Respondents’ allocation of electric costs arising under the Rate CS Contract between PDV Midwest, Needle Coker and Chicago Carbon does not constitute a “resale” of electricity.

REPLY: This paragraph consists entirely of legal conclusions to which no reply is required. To the extent that a reply is required, ComEd states that the Illinois Public Utilities Act, 220 ILCS 5/1-101, et seq., (the “Act”) speaks for itself as to its contents, and that any allegations that are contained in this paragraph concerning the Act that are inconsistent with its contents are therefore expressly denied.

In further reply, ComEd also states that the allegation in this paragraph that the “allocation of electric costs arising under the [Contract] between PDV Midwest, Needle Coker and Chicago Carbon does not constitute a ‘resale’ of electricity” is also denied. As stated above, Needle Coker and Chicago Carbon were not parties to the Contract and the Contract provided only for the “supply” of electricity to PDV Midwest. Because Needle Coker and Chicago Carbon were not subject to the Contract, the costs thereof could not be “allocated” to them.

Rather, electricity provided under the Contract was re-sold to Needle Coker and Chicago Carbon as is alleged in the Verified Complaint and Amended Petition filed in this matter.

6. ComEd has failed to allege facts supporting a cognizable claim for any violation of ComEd's tariff provisions. ComEd's tariff provisions entitled "Terms and Conditions" and Rider 12 are inapplicable to the Rate CS Contract. In the alternative, Respondents' allocation of electric costs arising under the Rate CS Contract between PDV Midwest, Needle Coker and Chicago Carbon does not constitute a "resale" of electricity.

REPLY: This paragraph consists entirely of legal conclusions to which no reply is required. To the extent that a reply is required, these allegations are denied. In further Reply, ComEd states that the Contract provides that ComEd will supply electricity thereunder pursuant to its "[t]erms and [c]onditions" and "and any other applicable rates, riders or tariffs" including ComEd's Rider 12. (Contract, para. 1.3(a)). The allegation in this paragraph that "ComEd's tariff provisions entitled '[t]erms and [c]onditions' and Rider 12 are inapplicable to the [Contract]" is contrary to this provision and is therefore denied.

In further reply, ComEd also states that the allegation in this paragraph that the "allocation of electric costs arising under the [Contract] between PDV Midwest, Needle Coker and Chicago Carbon does not constitute a 'resale' of electricity" is also denied. As stated above, Needle Coker and Chicago Carbon were not parties to the Contract and because the Contract provided only for the "supply" of electricity to PDV Midwest. Because Needle Coker and Chicago Carbon were not subject to the Contract, the costs of electricity provided under the Contract could not be "allocated" to them. Rather, electricity provided under the Contract was re-sold to Needle Coker and Chicago Carbon as is alleged in the Verified Complaint and Amended Petition filed in this matter.

7. ComEd is equitably estopped from asserting a claim that the combined billing and service as a single retail customer of the electric loads of the refinery, needle coking and calciner plants is contrary to the Act and ComEd's tariff provision. ComEd entered into the Rate CS Contract pursuant to which ComEd agreed to provision service to the refinery, calciner plant and needle coking plant as a single retail customer. In addition, between on or about December 1, 1989 and on or about May 1, 1997, ComEd provisioned service to the same facilities as a single retail customer, on a single account and via a combined bill. During the stated time period, Chicago Carbon was 100% owned by Unocal, Needle Coker was 50% owned by Uno-Ven, which was a 50/50 partnership between Unocal and PDV America, and 50% owned by Unocal, and the refinery was owned by Uno-Ven. Furthermore, in or about August, 2002, ComEd entered into an agreement pursuant to which ComEd will continue to provision electric service to the refinery and needle coking plant as a single retail customer, on a single account and via a combined bill. Needle Coker is currently 75% owned by Unocal and 25% owned by PDV Midwest, and the refinery is 100% owned by PDV Midwest

REPLY: Admitted that ComEd and PDV Midwest entered into the Contract. Denied, however, that in the Contract "ComEd agreed to provision service to the refinery, calciner plant and the needle coking plant as a single retail customer" as is alleged in this paragraph. In further reply, ComEd states that the Contract provides for the "supply" of electricity at the Premises that was "required by the Customer" (i.e., PDV Midwest) for its operations. The Contract does not provide for the supply of electricity to entities that have operations at the Premises.

Admitted that prior to May 1, 1997, ComEd "combined billed" the Premises as is alleged in paragraph 12 of the Verified Complaint and Amended Petition filed in this matter. Also admitted that from December 1, 1989 to May 1, 1997, the Premises was "owned" by Uno-Ven. In further reply, ComEd states that it provided "combined billing" for electric service provided to the Premises based on the understanding that Uno-Ven was the owner of and sole customer at the Premises. In further reply, ComEd states it does not have information that is sufficient to permit it to admit or deny the allegation in this paragraph that from December 1, 1989 to May 1, 1997 "Chicago Carbon was 100% owned by Unocal, Needle Coker was 50% owned by Uno-

Ven, which was a 50/50 partnership between Unocal and PDV America, and 50% owned by Unocal.” This allegation is therefore denied on that basis.

Admitted that in August 2002, ComEd entered into an Electric Facilities Service Agreement (the “August 2002 Agreement”) with CITGO that provided for, among other things, “electric facilities and equipment” to be provided at the Premises. Denied, however, that the August 2002 Agreement provided that ComEd would “continue to provision electric service to the refinery and the needle coking plant as a single retail customer, on a single account and via a combined bill.” In further reply, ComEd states that the August 2002 Agreement speaks for itself, and that any allegations in this paragraph that are inconsistent with the terms of the August 2002 Agreement are therefore denied.

Also admitted that at this time, that the refinery is “100% owned by PDV Midwest,” denied that the Premises as defined in the Contract is 100% owned by PDV Midwest. ComEd does not have information at this time that is sufficient to permit it to admit or deny the allegation in this paragraph that “Needle Coker is currently 75% owned by Unocal and 25% owned by PDV Midwest.” This allegation is therefore denied on this basis.

Finally, to the extent that this paragraph alleges that “ComEd is equitably estopped from asserting a claim that the combined billing and service as a single retail customer of the electric loads of the refinery, needle coking and calciner plants is contrary to the Act and ComEd’s tariff provisions,” it consists of legal conclusions and no reply is therefore required. To the extent that a reply is required, these allegations are denied.

8. ComEd is equitably estopped from asserting a claim that the electric loads of the refinery, needle coking and calciner plants are inappropriately metered. The electric load of the needle coking plant is metered, in part, through a meter that also measures the electric load of the calciner plant and, in part, through a meter that also measures a portion of the electric load of the refinery. As stated in affirmative defense number 7, above,

ComEd agreed to the provisioning of electric service to the facilities from in or about 1989 until present despite the metering configuration at the Lemont Facility. Accordingly, the bases for this affirmative defense are the same as those stated in number 7, above.

REPLY: Admitted that the electric load for the refinery, needle coking and calciner plants is not separately metered. ComEd does not, however, have information that is sufficient to permit it to admit or deny the allegation in this paragraph that the “electric load of the needle coking plant is metered, in part, through a meter that also measures the electric load of the calciner plant and, in part, through a meter that also measures a portion of the electric load of the refinery.” In further reply, ComEd states that the metering arrangement at the Premises was developed when Uno-Ven was the sole owner of the Premises and was appropriate at that time. ComEd also states that it has asked PDV Midwest to provide diagrams showing the present metering arrangement at the Premises and that PDV Midwest has refused to provide such diagrams. ComEd has also informed PDV Midwest that unless the diagrams are provided, separate metering for the refinery, needle coking and calciner plants cannot be provided.

To the extent that this paragraph refers to the allegations of the Respondents’ seventh affirmative defense, ComEd’s Reply to that affirmative defense is hereby incorporated herein. Finally, to the extent that this paragraph alleges that “ComEd is equitably estopped from asserting a claim that the electric loads of the refinery, needle coking and calciner plants are inappropriately metered,” it consists of a legal conclusion to which no reply is required. To the extent that a reply is required, this allegation is denied for the reasons that are stated above.

9. Granting ComEd’s requested relief would breach the Rate CS Contract and unjustly enrich ComEd by providing ComEd significant monetary sums in excess of ComEd’s bargained-for benefit.

REPLY: This paragraph consists entirely of legal conclusions to which no reply is required. To the extent that a reply is required, this paragraph is denied.

10. Respondents reserve their rights to add additional affirmative defenses as they become known.

REPLY: No response is required to the allegations set forth in Paragraph 10.

Dated: October 11, 2002

Respectfully submitted,
Commonwealth Edison Company

By: _____
One of the attorneys for
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CERTIFICATE OF SERVICE

I, Paul F. Hanzlik, do hereby certify that a copy of the foregoing Response Affirmative Defenses was served upon all parties on the attached Service List by e-mail and deposit in the United States mail, first class postage prepaid, at Three First National Plaza, 70 West Madison Street, Chicago, Illinois 60602 on this 11th day of October, 2002.

Paul F. Hanzlik

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